

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

ORIGINAL

77-4182

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p/s

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

YESHIVA UNIVERSITY,

Respondent,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor.

**On Petition for Enforcement of an Order of
The National Labor Relations Board**

**BRIEF FOR NEW YORK UNIVERSITY, NORTHEASTERN
UNIVERSITY, BOSTON UNIVERSITY, FAIRLEIGH
DICKINSON UNIVERSITY AND THE UNIVERSITY
OF VERMONT AMICI CURIAE**

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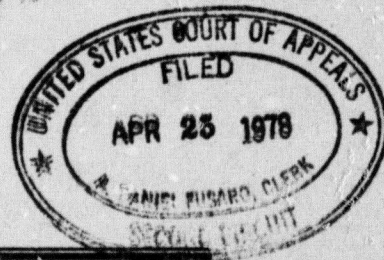


TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	3
INTEREST OF THE AMICI	4
STATEMENT OF FACTS	6
(a.) The Nature of the "Mature" University	6
(b.) The Threat Posed by the Proposed Application of the Act	11
ARGUMENT	12
POINT I - The NLRB Erred in Ruling That Faculty With Managerial and Supervisory Authority Are Not Managerial or Supervisory Employees Within the Meaning of the Act	18
(A.) Administrative background	18
(B.) Administrative findings of authority that is supervisory and managerial in nature	23
(C.) The Board erred in limiting the Act by utilizing the Board's new concept that the "ultimate authority" of the University's Board of Trustees negates the Faculty's authority	27
(D.) The Board erred in modifying the Act by utilizing the Board's new doctrine that the Act's exclusions apply only to individual authority and not to collective authority	30

	<u>Page</u>
(E.) The Board erred by limiting the Act by utilizing the Board's new concept that authority which is in the interest of the faculty is thereby not in the interest of the employer	32
POINT II - The Board Erred in Ruling That Faculty Who Are Members of Governance Committees Are Not Managerial or Supervisory Employees Within the Meaning of the Act	35
(A.) The Board erred in limiting the Act by utilizing the Board's new concept that faculty members on Governance Committees "serve as representatives of the faculty rather than management".....	35
(B.) The Board erred in limiting the Act, disregarding "collective authority" in relation to faculty members of governance committees	38
POINT III - The Board Erred in Ruling That Department Chairmen Are Not Supervisory or Managerial Employees Within the Meaning of the Act on the Basis of the Board's Concept That the Chairmen's Authority Is Exercised "Primarily As Instruments of the Faculty ... From Whom They Receive Their Authority"	39
POINT IV - The Board Erred in Denying Supervisory Status to Various Individuals Who Supervised Non-unit Employees But Who Spent Less Than Fifty Percent of Their Time Exercising Such Authority, On the Basis of the Board's Unstated, But Obvious Application of Its Fifty Percent Rule	41

POINT V - The Board Erred in Its Treatment of Part-time Faculty By Applying a Rule Adopted on the Basis of a Procedure Other Than That Required By Statute	46
---	----

CONCLUSION	52
------------------	----

TABLE OF AUTHORITIES

<u>CASES CITED</u>	<u>Page</u>
<u>Arizona Public Service Co. v. N..R.B.,</u> 453 F. 2d 228 (1971)	43
<u>Boire v. Greyhound, 376 U.S. 473 (1964)</u>	4
<u>Boston University, Trustees of, v. N.L.R.B.,</u> No. 77-1143 (1st Cir. Filed 1977)	4
<u>Eastern Greyhound Lines v. N.L.R.B.,</u> 337 F. 2d 84 (6th Cir. 1964)	28
<u>Inland Steel v. N.L.R.B., 170 F. 2d 247,</u> (7th Cir. 1948)	17
<u>J.I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944)</u>	17
<u>N.L.R.B. v. Bell Aerospace Co., Division of</u> <u>Textron, Inc., 416 U.S. 267 (1974)</u>	<u>Passim</u>
<u>N.L.R.B. v. Fullerton Publishing Co., d/b/a Daily</u> <u>News Tribune 283 F. 2d 545 (9th Cir. 1960)</u>	43
<u>N.L.R.B. v. Gary Aircrafts Corp.,</u> 368 F. 2d 223 (th Cir. 1966)	28
<u>N.L.R.B. v. Leland-Gifford Co.</u> 200 F. 2d 220 (1st Cir. 1952)	43
<u>N.L.R.B. v. Mercy College, 536 F. 2d 544 (1976)</u>	43
<u>N.L.R.B. v. Metropolitan Life Ins. Co.,</u> 405 F. 2d 1169 (2nd Cir. 1968)	28, 38, 43
<u>N.L.R.B. v. Scott Paper Co., 440 F. 2d</u> 625 (1st Cir. 1971)	33
<u>N.L.R.B. v. Southern Airways Co.,</u> 290 F. 2d 519 (th Cir. 1961)	28
<u>N.L.R.B. v. Wentworth Institute of Technology,</u> 515 F. 2d 550 (197)	31
<u>N.L.R.B. v. Westinghouse Electric Corp.</u> 424 F. 2d 1151 (7th Cir. 1970)	43, 44
<u>N.L.R.B. v. Wyman-Gordon Co.,</u> 394 U.S. 759 (1969)	49, 50
<u>Ohio Power Co. v. N.L.R.B., 176 F. 2d 385</u> (6th Cir. 1949), <u>cert. denied</u> , 338 U.S. 900 (1949).....	25, 35, 43

DECISIONS OF NATIONAL LABOR
RELATIONS BOARD CITED

	<u>Page</u>
<u>Adelphi Univ.</u> , 195 N.L.R.B. 639 (1972)	<u>Passim</u>
<u>Catholic Univ.</u> , 205 N.L.R.B. 130 (1973) (Supp. Dec.)..	48
<u>Claremont College</u> , 198 N.L.R.B. 121 (1972).....	41
<u>C.W. Post Center of Long Island Univ.</u> , 189 N.L.R.B. 904 (1971)	<u>Passim</u>
<u>Fairleigh Dickinson Univ.</u> , 227 N.L.R.B. 239 (1976)	4, 16
<u>Fairleigh Dickinson Univ.</u> , 205 N.L.R.B. 673 (1973)	4, 16, 25
<u>Fordham Univ.</u> , 214 N.L.R.B. 971 (1974)	20, 23, 41
<u>General Dynamics Corp., Convair Aero. Div.</u> , 213 N.L.R.B. 851 (1974)	29
<u>Michalik, d/b/a Service Metal Industries</u> , 96 N.L.R.B. 10 (1951)	17
<u>Northeastern University</u> , 218 N.L.R.B. 247 (1975)	<u>Passim</u>
<u>New York University</u> , 205 N.L.R.B. 4 (1973)	<u>Passim</u>
<u>New York University</u> , 221 N.L.R.B. 1148 (1975)	4
<u>Shamrock Dairy</u> , 119 N.L.R.B. 998 (1957)	17
<u>Typoservice Corp.</u> , 203 N.L.R.B. 1180 (1973)	17
<u>University of Chicago Library</u> , 13-CA-11447	41
<u>University of Miami</u> , 213 N.L.R.B. 634 (1974)	20, 23
<u>University of Vermont</u> , 223 N.L.R.B. 423 (1976)	4
<u>Westinghouse Electric Co.</u> , 163 N.L.R.B. 723 (1967)....	43
<u>Yeshiva Univ.</u> , 221 N.L.R.B. 1053 (1974)	<u>Passim</u>

STATUTES CITED

	<u>Page</u>
National Labor Relations Act, 29 U.S.C. § 151, <u>et seq.</u>	
§ 1 29 U.S.C. § 151	17
§ 2(11) 29 U.S.C. § 152 (11)	<u>Passim</u>
§ 2(12) 29 U.S.C. § 152 (12)	10
Administrative Procedure Act 5 U.S.C. §§ 551 <u>et seq.</u>	46, 48

ARTICLES CITED

	<u>Page</u>
R.S. Brown, Jr., "Collective Bargaining in Higher Education", 67 Mich. L. Rev. 1067 ('68-'69)	11
B. Davis, "Unions and Higher Education: Another View", 49 Educ. Record 139 (1968), reprinted in 54 A.A.U.P. Bull. 317 (1968)	7
M. Finken, "Collective Bargaining and University Government", 57 A.A.U.P. Bull. 149 (Summer, 1971)	7
S.H. Kadish, "The Theory of the Profession and Its Predicament", 58 A.A.U.P. Bull. 120 (Summer, 1972)	11,18
K. Kahn, "The NLRB and Higher Education" The Failure of Policymaking Through Adjudication",	<u>Passim</u>
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D.H. Wollett, "Self-Governance and Collective Bargaining: Can They Co-exist?", paper delivered at National Center for the Study of Collective Bargaining in Higher Education, Baruch College, N.Y., April 12, 1973.....	12

MISCELLANEOUS AUTHORITIES CITED

Post Hearing Memorandum of Y.U. (2-RC-16662.....)	49
"Faculty Participation in the Selection & Retention of Administrators' Statement prepared by A.A.U.P. Committee on College and University Government, adopted by Council of the American Association of University Professors, Nov., 1974....."	15

	<u>Page</u>
Advice Memorandum by H.T. Datz, Assoc. Gen. Counsel, Div. of Advice, N.L.R.B., March 18, 1977.....	26
Statement on Government of Colleges and Universities.....	8
Brief to Second Circuit, National Labor Relations Board.....	20, 46
Brief to Second Circuit by Amicus, American Assn. of Univ. Professors.....	9

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AMICI CURIAE

STATEMENT OF THE ISSUES

I

Was the National Labor Relations Board correct in ruling that faculty with managerial and supervisory authority are not managerial or supervisory employees within the meaning of the National Labor

Relations Act by relying on the Board's concept that the "ultimate authority" of a University's Board of Trustees negates the faculty's authority?

Was the Board correct in ruling that such faculty are not managerial or supervisory employees within the meaning of the Act on the basis of the Board's doctrine that the Act applies only to individual authority and not to authority exercised on a collective basis?

Was the Board correct in ruling that such faculty are not managerial or supervisory employees within the meaning of the Act on the basis of the Board's concept that authority which is in the interest of the faculty is thereby not in the interest of the employer?

II

Was the Board correct in ruling that faculty who are members of governance committees are not managerial or supervisory employees within the meaning of the Act on the basis of the Board's concept that such governance committee members "... serve as representatives of the faculty rather than management"?

Was the Board correct in ruling that such governance committee members are not managerial or supervisory employees within the meaning of the Act on the basis of the Board's concept that the Act applies only to individual authority and not to authority exercised on a collective basis?

III

Was the Board correct in ruling that department chairmen are not managerial or supervisory employees within the meaning of the Act on the basis of the Board's concept that chairmen's authority is exercised "primarily as instruments of the faculty ... from whom they receive their authority"?

IV

Was the Board correct in denying supervisory status to various individuals who supervise non-unit employees but who spend less than 50% of their time exercising such authority, on the basis of the Board's unstated but obvious application of its so-called "50%-rule"?

V

Was the Board's treatment of part-time faculty correct in its application of a rule adopted on the basis of a procedure other than that required by statute?

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board (hereinafter the "NLRB" or the "Board"), pursuant to Section 10(e) of the National Labor Relations Act (hereinafter the "Act"), 29 U.S.C. § 160(e), for enforcement of its order of August 24, 1977 against Yeshiva University (sometimes hereinafter "Y.U.").

This Brief is submitted by Amici Curiae New York University, Northeastern University, Boston University, Fairleigh Dickinson University, and the University of Vermont. (1)

(1) The University of Vermont's amicus interests are only with regard to the issue of department chairmen. N.Y.U.'s amicus interests are only with regard to points I through IV.

INTEREST OF AMICI

New York University, Northeastern University, Boston University, Fairleigh Dickinson University and the University of Vermont are private non-profit institutions of higher education, each of which has already experienced one or more faculty representation cases before the NLRB.⁽²⁾ At N.Y.U., Northeastern and the University of Vermont, issues raised in their NLRB proceedings were rendered ineligible for judicial review by virtue of their faculty's outright rejection of faculty unionization.⁽³⁾ Amicus Boston University, is currently involved in judicial review in the First Circuit in regard to the factual propriety of the Board's decision regarding department chairmen in the factual circumstances of that institution and an essentially unrelated issue involving part-time faculty (as well as other issues, not relevant to this case).⁽⁴⁾ Amicus Fairleigh Dickinson University, has experienced faculty collective bargaining, which experience has caused it to adopt its amicus position herein.

(2) New York University, 205 NLRB 4 (1973); 221 NLRB 1140 (1975); Northeastern University, 218 NLRB 247 (1975); University of Vermont, 223 NLRB 423 (1976); Fairleigh Dickinson Univ., 205 NLRB 673 (1973); 227 NLRB 239 (1976).

(3) Under established principles of labor law, appellate judicial review requires the Board certify a labor organization as having won the election, followed by a refusal to bargain by the institution and finally an unfair labor practice finding which constitutes the "final order" necessary for judicial review; Boire v. Greyhound, 376 U.S. 473 (1964).

(4) Trustees of Boston University v. N.L.R.B., 77-1143 (1st Cir.). Note: We have just been advised that a 1st Circuit decision has been issued but have not yet received same.

New York University was incorporated by Act of the Legislature of the State of New York, Chapter 176 of the Laws of 1831, as thereafter amended. It maintains offices and educational facilities at locations in New York City, and elsewhere. At the time of its most recent representation case before the NLRB, there were approximately 6,000 full-time and part-time faculty. New York University had a total enrollment of approximately 40,000 students.

Northeastern University traces its origins back to 1898 with the founding of the Evening Law School of the Boston Young Men's Christian Association. It has been known as Northeastern University since 1936. Its principal facilities are located in Boston, Massachusetts. At the time of its representation case before the NLRB, there were approximately 1,600 full-time faculty at Northeastern. Northeastern had a total student enrollment of approximately 35,000.

Boston University was incorporated by the State of Massachusetts in 1869. Its principal facilities are located in Boston, Massachusetts. At the time of its representation case before the NLRB, there were approximately 2,000 full-time and part-time faculty. Boston University had an enrollment of approximately 24,000 students.

Fairleigh Dickinson University was incorporated in 1942. Its principal educational facilities are located at three campuses in New Jersey, one at Rutherford, one at Teaneck-Hackensack, and one at Madison. At the time of its

representation case before the NLRB, there were approximately 1,300 full-time and part-time faculty. Fairleigh Dickinson University had a total enrollment of approximately 20,000 students.

The University of Vermont was chartered in 1791. It has held its present corporate structure, inclusive of the Vermont Agricultural College, since 1955. Its facilities are located in Burlington, Vermont. At the time of its representation proceeding before the NLRB, there were approximately 820 full-time and part-time faculty. The University of Vermont had an enrollment of approximately 9,000 students.

STATEMENT OF FACTS

(a.) The Nature of the "Mature" University

The positions of amici herein, particularly in regard to the supervisory and managerial status of full-time faculty, relate not to all colleges and universities but to those that may be described as the more "mature" private institutions of higher education that have adopted a collegial decision-making process. (5) As the former Associate General Counsel of the American Association of University Professors noted, there is

(5) It should be noted that both N.Y.U. and Northeastern raised the same or similar arguments in their cases before the Board. Fairleigh Dickinson University, Boston University and the University of Vermont did not. Amici are not aware of any significant number of currently represented faculty who would be affected by a decision granting managerial or supervisory status to faculty who play an integral role in the academic decision-making process at a mature collegially-governed private university. Indeed, it should be noted that the vast majority of currently represented faculty are at two year colleges and public institutions.

a wide spectrum among institutions of higher education in terms of faculty authority:

"At the other end of the governance spectrum there are a number of institutions in which the faculty plays a significant, if not a determinative, role in the development of institutional policy. These commonly are regarded as the academically better institutions. More likely than not the majority of institutions fall somewhere along the spectrum represented by the powerless faculty of the autocratic or bureaucratic institution and the powerful faculty of the mature university and college." (6)

Although the Board has recognized the substantial authority of faculty at such universities, the Board has been unable to perceive that such faculty authority is neither ephemeral nor revocable. In the mature university, however, the faculty authority is a matter of right based on the faculty's preeminent position as the arbiter of the university's academic purpose. Thus, as noted by Professor Davis:

"... it has been commonly assumed that the board delegates authority to the president, and the president in turn may delegate certain parts of it to the faculty ... The faculty's authority, it is clear, rests not upon presidential understanding or largesse, but upon the faculty's right, as the institution's foremost professional body, to exercise the preeminent authority in all matters directly related to the institution's professional work. The president, in short, is not the faculty's master. He is as much the faculty's administrator as he is the board's" (7)

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- (6) M. Finken, "Collective Bargaining and University Government", 57 A.A.U.P. Bull. 149, 151 (Summer, 1971) (footnotes omitted).
- (7) B. Davis, "Union and Higher Education: Another View", 49 Ed. Record 139, 143 (1968).

In a very real sense this "preeminent authority" means the relationship between faculty and "the administration" of the mature university is the very opposite of the relationship between employees and management in the industrial sector. Indeed, this variance with the industrial sector is evident in all aspects of university life:

"The faculty role in academic governance is primarily centered in the decision-making stage, e.g., the determination of admission standards versus routine admission processing. The activation of the decision-making process and the execution of the formulated policies are routinely left to the administration." (8)

Faculty authority extends not merely to overall matters of governance and management but just as well to what in Board terminology is known as the faculty's "conditions of employment". As noted by the "Official Statement on Government of Colleges and Universities" adopted by the Association of Governing Boards of Universities and Colleges, the American Association of University Professors and the American Council on Education:

"Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the facts that its judgment is central to general educational policy."

The underlying difficulty in the Board's application of the Act to the mature university stems in large measure from

(8) K. Kahn, "The NLRB And Higher Education: The Failure Of Policymaking Through Adjudication", 21 U.C.L.A. Law Rev. 63, 73-74, (1973).

this vast difference between faculty at the mature university and employees in the industrial sector for which the Act was designed:

"[In industry] responsibility for product quality and production is vested in the president and executives of the corporation, not in the production employees. In the college or university, the line of authority is quite different. Control over the 'product' (education) is centered in the production employees (faculty). The role of the administration is not to control the final product but rather to serve as a custodian of the material resources necessary to perform the primary educational tasks of the institution. The fundamentally different roles of the private sector management and the college or university administrator are reflected in the actual decision-making structure of the institution. When decisions are made which affect the primary purpose of the institution, the faculty prevails," (emphasis added). (9)

The Board's attempts to deal with such difficulties by adopting novel modifications and limitations upon the Act's provisions are so at variance with the reality of mature universities that even those desiring collective bargaining have difficulty supporting their validity. For example, as an amicus in support of the Board notes with regard to one such Board limitation:

"... the faculty's independence from managerial control in exercising its professional judgment negates any assertion that it is acting for (and thus is accountable to) higher authority..." (10)

(9) Ibid at 67 n. 5.

(10) A.A.U.P. Brief, p. 23.

Moreover, the faculty's managerial or supervisory status at the mature university is more than a mere attribute of their "professional" status, as the Board would suggest. Thus, no one seriously questions that all professional librarians, researchers, registrars, as well as virtually every full-time and part-time faculty member at every university are "professional employees" within the meaning of the Act.⁽¹¹⁾ No one seriously contends, however, that the authority of the vast majority of such "professional employees" even remotely approaches that of faculty at the small number of truly collegially-governed universities. When one compares the authority of such faculty to the "professional employee" in private industry, the difference becomes even more obvious:

"The faculty, by the very nature of the educational process in institutions of higher education, participates in decision-making which in private industry would normally be regarded as a management prerogative. The faculty at most four-year colleges and universities has a voice in determining standards for admissions, curriculum, degree requirements, faculty hiring and promotion, and even tuition rates. Such a state of independence is entirely unknown among the professionals in private industry." (footnotes omitted).⁽¹²⁾

Thus, it is widely recognized in academia that if the status of faculty at such universities is analyzed in terms of

(11) Section 2(12), 29 U.S.C. 152 (12).

(12) Kahn, supra at 58.

the industrially-structured Act, such faculty must inevitably be considered "a part of management".⁽¹³⁾ That such faculty are a part of management is not to in any way belittle their importance in the teaching tasks of the institution. Rather, it is to recognize their dual function:

"But professors are the essence of the university enterprise, as well as its employees. They don't simply execute assigned, segmented tasks. They conceive, they plan, they govern, and they perform the processes of research and education."⁽¹⁴⁾

(b.) The Threat Posed by the Proposed Application of the Act

At mature private institutions of higher education where collegial decision-making has long been the rule, there already exist on-going governance mechanisms in which faculty have a vital role. Certain governance mechanisms, such as Senates, are concerned with virtually all decisions involving the institution (as is the Committee on Academic Priorities and Resource Allocation at Yeshiva University); others, such as Faculty Councils and Faculty Grievance Committees (including the Faculty Review Committee at Y.U.) have authority more exclusively in regard to what might be described as "conditions of employment" relating to faculty (hiring, salary, rank promotion, tenure, etc.).

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- (13) Ralph S. Brown, Jr., (Associate Dean of Yale Law School and then-President of the American Association of University Professors) in "Collective Bargaining in Higher Education" 67 Mich. L. Rev. 1067, 1071. Dean Brown's analysis is in regard to those institutions of higher education whose governance structure conforms to the Statement of Government of Colleges and Universities.
- (14) S. Kadish, (Professor of Law at the University of California at Berkeley) "The Theory of the Profession and Its Predicament", 58 A.A.U.P. Bull. 120, 122 (Summer, 1972).

The imposition by the NLRB of collective bargaining rules designed for industrial settings into these academic communities unavoidably results in substantial harm to these governance bodies and thereby to the decision-making process in academia. In a study of collective bargaining's effects on governance bodies at unionized public and private institutions of higher education, it was found "... that a union tends eventually to weaken the power of a Faculty Senate...". (15)

Indeed, scholars in the field have indicated that when a university community has been subjected to collective bargaining for longer periods of time, Senates will not merely be weakened but effectively destroyed. As one noted:

"...faculties cannot expect self-governance through academic Senates or similar vehicles to survive - at least as institutions of significance, if they opt for collective bargaining." (16)

The weakening or effective elimination of faculty governance bodies as a result of the Board's current policy in regard to institutions where faculty already play a crucial role in academic decision-making has already been recognized by the Board. Thus, the Board has observed:

(15) Reisman, Davis, Ed., Academic Transformations, McGraw Hill Co., New York, 1973, p. 425.

(16) D.E. Wollett (Professor of Law at the University of California at Davis) "Self-Governance and Collective Bargaining: Can They Co-exist?", (paper delivered at National Center for the Study of Collective Bargaining in Higher Education, Baruch College, New York, April 12, 1973).

"The delegation by the University to such elected groups of a combination of functions, some of which are, in the typical industrial situation, normally more clearly separated as managerial on the one hand and as representative of employees interests on the other, could raise questions both as to the validity and continued viability of such structures under our Act, particularly if an exclusive bargaining agent is designated," (emphasis added). (17)

In the Board proceeding involving one of the amici herein, the majority opinion took note that a communication had been received by the Board from faculty requesting clarification of the Board's position and quoted from such faculty communication as follows:

" '...we are in the dark as to the impact of an affirmative vote upon our collegial system with its shared governance arrangements.' The letter further stated that 'we believe that the Board will do a grave disservice to faculty members at our institution if it orders an election without providing the needed clarification. For example, we must know the likely effect on the role of our committees on promotion and tenure and selection of administrators, on our Faculty Senate and on other matters intimately involved with relationships of faculty to the University and to each other'", (footnote omitted). (18)

Despite the recognized "concern of faculty members", the Board majority simply ignored the issue, indicating that it was not its rule "to give advisory opinions". (19)

(17) Adelphi University, 195 NLRB 630, 648 n.31 (1972).

(18) Northeastern University, 218 NLRB 247, 249 (1975).

(19) Ibid.

The third member of the Board's panel, however, was less reserved.

He noted:

"It has been long established that since an employer's obligation to bargain with a selected representative is 'exclusive', it carries with it 'the negative duty to treat with no other'...

In my judgment this Board is statutorily required to apply the exclusive representation principle to those colleges and universities over which it asserts jurisdiction. Undoubtedly, this will affect the ability of faculty members to utilize existing governance structures in dealing with the administration over 'rates of pay, wages, hours of employment, or other conditions of employment', (footnotes omitted). (20)

What the Board has failed to consider, however, is that if the authority of existing governance bodies on particular campuses are negated as a result of such NLRB rulings, the collegial decision-making process carried out through such governance bodies may well be destroyed and the nature of important academic communities adversely changed as a result.

Similarly, it is commonplace at "mature" collegially-oriented private universities that faculty members sit on committees that play a significant role in the search for university officers, such as Presidents and Deans, as well as department chairmen. As the American Association of University Professors noted, the prevailing concept of University governance fully

(20) Ibid at 256.

"expect[s] that faculty members will have a significant role in the selection of academic administrators, including the president, academic deans, department heads, and chairmen," (footnote omitted). (21) Such a system can only exist in a collegial, rather than collective bargaining, atmosphere since no institution forcefully and unnaturally divided into "labor" and "management" can suffer the selection of "management" by members of "labor". If NLRB rules are imposed on outstanding private universities, the integral role played by faculty in choosing the leadership of these educational institutions and of directing and guiding the functions of such institutions will be destroyed by an imposed industrial-type adversarial structure not at all intended for, or capable of use at, such campuses.

An example of the tendency of the NLRB's utilization of industrial collective bargaining rules and principles to adversely affect or destroy the nature of academia was provided at the campus of the only amici which has recognized a faculty union; namely Fairleigh Dickinson. Previous to the introduction of faculty unionization, department chairmen at Fairleigh Dickinson University, as the Board itself recognized, had the power and authority of statutory "supervisors". Indeed, the

(21) "Faculty Participation in the Selection and Retention of Administrators", Statement prepared by the AAUP's Committee on College and University Government and adopted by the Council of the American Association of University Professors in November, 1974.

Board noted that among other powers "the record [prior to certification of the bargaining unit] clearly shows that department chairmen have substantial authority for the hiring of new faculty members and retention of faculty members who have not yet attained tenure". (22) Such a system, however, could hardly withstand the effect of the NLRB's imposition of an adversarial structure and the Board recently reconsidered the Fairleigh Dickinson University situation, noting in the process:

"We ... find that the collective bargaining agreement between the parties has so changed the authority and responsibility of the department chairpersons that they are no longer supervisors under the Act." (23)

The disruptive effect of misapplied industrially-oriented rules to academia can also fully destroy the "tenure" system which is central to both academic freedom and the integrity of the relationship between academes and leading institutions of higher learning. Thus, it is a basic labor law principle that all existing "contracts" affecting what the Board defines as "terms and conditions of employment" are subject to complete revision or revocation upon collective bargaining certification:

"Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of ... to limit or condition the terms of the collective agreement."

(22) Fairleigh Dickinson University, 205 NLRB 673, 675 (1973).

(23) 227 NLRB 239, 241 (1976).

... The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.

... But it is urged that some employees may lose by the collective bargaining agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account. We find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones," (footnotes omitted). (24)

There can be little question that the subject matter of job security which is inextricably involved in express and implied tenure contracts falls within the purview of "terms and conditions of ... employment" (25) As such, faculty tenure arrangements would be totally subject to the jeopardy of the bargaining process. Indeed, at one organized educational institution, the union has already demanded that tenured faculty who have not paid union dues pursuant to the union's agency shop requirement be terminated. (26)

While the elimination of private employment contracts in light

(24) J.I. Case Co. v. NLRB, 321 U.S. 332, 337-38 (1944). See also Typoservice Corp., 203 NLRB 1180, 1190 (1973),

(25) Section 1 of the Act, 29 U.S.C. § 151. Subjects of bargaining include termination, Inland Steel v. NLRB, 170 F. 2d 247 (7th Cir., 1948); changes in employee status, Shamrock Dairy, 119 NLRB 998, 41 LRRM 1216 (1957); and layoffs, Michalik, d/b/a Service Metal Industries, 96 NLRB 10, 28 LRRM 1477 (1951).

(26) University of Bridgeport. An "agency shop" clause, which requires payment of union dues and initiation fees as conditions of continued employment, has full legal validity under Section 8(a)(3) of the Act.

of collective bargaining may be understandable and necessary in an industrial atmosphere, the effect of the same rules being applied in academia in matters such as tenure rights is neither understandable nor tolerable.

The former President of the American Association of University Professors observed that the threat of collective bargaining in such situations went to the very heart of the academic structure:

"The process of collective bargaining itself, which has been gaining increased ground in higher education, raises problems even apart from the strike. In dividing the university into worker-professors and manager-administrators and governing boards, it imperils the premise of shared authority, encourages the polarization in interests and exaggerates the adversary concerns over interests held in common. In placing the professor in the position of bargainer seeking to exact his demands from the university's managers and owners, the process of collective bargaining heavily burdens the professor's role as primary governor of the educational enterprise. Moreover, the process itself as it functions tends to remit issues which faculty should themselves determine to outside agencies such as state and federal boards, arbitrators, and union bureaucracies. In addition, since unions rest on continued support of their constituency, the process becomes susceptible to essentially political rather than essentially academic decision-making." (27)

In short, what is at issue in this proceeding is the continued viability of collegial decision-making at mature universities that are essential to the maintenance of academic excellence.

(27) S. Kadish, op. cit at 122.

ARGUMENT

POINT I

THE NLRB ERRED IN RULING THAT
FACULTY WITH MANAGERIAL AND
SUPERVISORY AUTHORITY ARE NOT
MANAGERIAL OR SUPERVISORY
EMPLOYEES WITHIN THE MEANING
OF THE ACT

(A.) Administrative background

The issues before this Court arose in the context of a representation proceeding before the Board. (28) The intervenor, Yeshiva University Faculty Association, sought to represent certain Y.U. faculty. Yeshiva University contended that the faculty at issue, "by virtue of their group participation in faculty governance - are supervisory or managerial, and are thereby not employees within the meaning of the Act...". (29) Recognizing that the Board had previously rejected similar arguments, Y.U. urged the Board to reconsider its previous decisions. The Board, however, chose to rest on its prior decisions and held:

"We find from our examination of the record... that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, and granting of tenure, and other areas of governance are not significantly different from what they were

(28) 2-RC-16662.

(29) Y.U., 221 NLRB 1053, 1054 (1974).

in the cited cases, wherein the same argument was rejected. At Yeshiva University, faculty participation in collegial decision-making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer', and final authority rests with the board of trustees", (footnotes omitted). (30)

As indicated, the Board offered no basis or rationale in its Y.U. decision for the concepts used to limit the managerial and supervisory exclusions of the Act. Rather than analyze its concepts, the Board relied entirely on "its earlier decisions." The Board now asks for deference to its administrative expertise (31) supposedly developed in its earlier cases. (32) A short review of these earlier cases, however, demonstrates that the Board is not entitled to such deference, inasmuch as the doctrines utilized in their earlier cases were equally without foundation and clearly not grounded in a correct factual understanding of mature university communities or in administrative expertise.

Thus, the "ultimate authority" concept was first announced by the Board in its Adelphi decision, with the following comment:

(30) Ibid.

(31) Board Brief p. 15.

(32) The Board cited the following cases (in chronological order), C.W. Post Center, 189 NLRB 904 (1971); Fordham University, 214 NLRB 971 (1974); Adelphi, supra; University of Miami, 213 NLRB 634 (1974); and Northeastern, supra.

"In this case, as in Post, the ultimate authority does not rest with the peer group but rather with the board of trustees. Thus, although the facts indicate that much respect is paid by the trustees to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves." (33)

The Board had previously noted in Adelphi, however, that, in fact, the Board of Trustees had always accepted the applicable recommendations of the faculty body at issue. (34) The only other Board "rationale" with regard to the ultimate authority doctrine came in its N.Y.U. decision, supra, which was equally enigmatic. (35)

In his analysis of the ultimate authority doctrine, Kahn noted:

(33) Supra at 648.

(34) Adelphi, supra, at 647.

(35) The stated rationale in the N.Y.U. case was as follows:

"The employer elicited testimony from its own witness, Miguel de Capriles, vice president, general counsel, and secretary of the University, that, in broad terms, an organizational chart would show a 'sort of hierarchical structure with a fairly clear line of command from the trustees down to the employees of the institution. You have the trustees on the top. The president would be under that. The various units of the university would be under that. Administrators and faculty members would probably be down at the bottom somewhere.'"

As the Board itself admitted, however:

"...de Capriles later qualified his answer with respect to the manner in which the University functioned in practice...". (205 NLRB at 5).

"Thus, the NLRB's reliance in *Adelphi* on the collegial model for its holding that college and university faculty members are not supervisors seems to be inappropriate. The Board's conceptual model is unrealistic and its use reflects the Board's lack of expertise in the educational field. It appears that the Board is truly confounded by the concept of shared authority which is present in colleges and universities.

The Board's reliance on the supremacy of the Board of Trustees in *Adelphi* for its holding that the faculty members were not supervisors can also be criticized on a second ground. What the Board failed to realize is that almost all private colleges and universities are non-profit corporations. As such, they must abide by their state's corporation laws which require that final institutional authority be vested in a board of trustees. Thus, the NLRB will always find that the 'trustees reserve the ultimate authority for themselves' when in practice, the trustees delegate most of their authority to the faculty and administration." (36)

The Board's "collective authority" doctrine was, in fact, introduced in *C.W. Post*, *supra*, but neither in that decision nor any subsequent reference to the doctrine by the Board is there offered the slightest justification or rationale.

As Kahn noted:

"Furthermore, the Board has been unable to substantiate its novel holdings with precedent or adequate reasoning. The best example of this failure is the Board's holding in *C.W. Post* that policy-making and quasi-supervisory authority exercised as a group does not fall within the meaning of section 2(11) of the National Labor Relations Act. The Board cites absolutely no precedent for this contravention of the explicit terms of section 2(11) and rightfully so, since there

(36) Kahn, *op.cit.* at 70.

is no citable precedent", (footnote omitted). (37)

As to the Board's concept that authority which is in the interest of the faculty thereby is not in the interest of the employer", while the Board cites its earlier decisions in C.W. Post, supra and Fordham, supra, as precedent, in fact, there is no reference in either of those decisions, or in several other earlier decisions on this issue to this concept.

The concept actually was introduced by the Board some four years later in its University of Miami decision, supra, and neither in that decision nor in any subsequent references to the concept is there any explanation or rationale.

This is the basis in law and administrative expertise for the three Board doctrines that are at issue in regard to the status of faculty at mature universities. Accordingly, we suggest that the Board's doctrines should be given keen judicial scrutiny instead of judicial deference.

(B.) Administrative findings of authority that is supervisory and managerial in nature

The Board's decision in Y.U. made clear, as it had in previous cases, that the Board factually recognized that faculty, at least at certain institutions, had significant "authority" with respect to numerous conditions of employment and matters of governance. Once these findings are

(37) Ibid at 95.

explored it becomes apparent that the Board has unlawfully limited the statutory definition of "supervisory" employees⁽³⁸⁾ as well as what the Supreme Court has suggested, is the even broader exclusion from the Act for "managerial" employees.^(38a)

Thus, summarized in its Y.U. decision, supra, the Board recognized faculty's authority:

"...with respect to hiring, promotion, salary increases, the granting of tenure and other areas of governance."⁽³⁹⁾

Still other aspects of faculty authority were noted in previous Board decisions which the Board adopted by reference in Y.U.⁽⁴⁰⁾ Thus, the Board has also noted:

"Faculty status, including appointment, re-appointment, promotion, tenure, and dismissal, are also matters as to which the full-time faculty exercised power and responsibility."⁽⁴¹⁾

(38) "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Section 2(11) of the Act, 29 U.S.C. § 152(11).

(38a) NLRB v. Bell Aerospace Co. Div. of Textron Inc., 416 U.S. 267, 277 (1974).

(39) Y.U., supra at 1054.

(40) Ibid (referring to cases).

(41) C.W. Post, supra, at page 905.

The law is clear that the possession of either actual or effective recommendatory authority with respect to any one or more of the conditions of employment specified in Section 2(11) are sufficient to require "supervisory" status.⁽⁴²⁾ As indicated, the Board has recognized the faculty's supervisory authority with respect to several of such conditions of employment. Indeed, the Board has specifically referred to faculty authority at such institutions as being supervisory in nature.⁽⁴³⁾

It is submitted that the Board has also conceded that faculty have authority that requires their exclusion as managerial employees. The most basic requirement for the managerial exclusion is authority to "formulate, determine and effectuate management policies".⁽⁴⁴⁾ The Board's decision in *Y.U.* noted, albeit in typically cryptic form, that *Y.U.*'s faculty "participate in collegial decision-making"⁽⁴⁵⁾ which constitutes the policy-making process at the mature university.

The Board has noted in other cases incorporated by reference in its *Y.U.* decision, several specific areas of

(42) *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir., 1949), cert. denied, 338 U.S. 899 (1949).

(43) Note, for example, the Board comment that such faculty had "some supervisory authority", *Adelphi Univ.*, *supra* at 648, or that they "possess as a group certain attributes of supervisors", *N.Y.U.*, 205 NLRB at 6.

(44) *Textron*, *supra* at 276, 288.

(45) *Supra* at 1054.

university policy-making as to which faculty possess effective authority:

"The statutes of the University grant the full-time faculty the power and responsibility to formulate and recommend student admission, curriculum, and graduation requirement policy, and rules for students, grading, and honor assignments." (47)

In fact, the Board has even referred to faculty as having "policy-making" authority, (48)

The administrative recognition that faculty, at least at mature universities, actually have authority easily identified as managerial in the traditionally accepted meaning of that term has been acknowledged by the NLRB's Office of the General Counsel. Thus, in a recently obtained Advice Memorandum from the Board's Associate General Counsel, it was noted:

"In a college or professional school which has a shared or 'collegial' governance structure, certain functions which, in the context of an industrial plant are generally performed solely by management, are either shared with or entirely delegated to groups of faculty members." (49)

Accordingly, the Board's findings in Y.U. and various other earlier cases are tantamount to an administrative determination that certain faculty are within the statutory

(47) Adelphi, supra, at 640.

(48) C.W. Post, supra, at 905.

(49) Advice Memorandum dated March 18, 1977 by Harold J. Datz, Associate General Counsel, Division of Advice, in Endicott College, Case No. 1-CA-12171.

category of supervisory and managerial employees. We now examine the Board's misplaced efforts to avoid the conclusion that such employees are excluded from the Act's coverage.

(C.) The Board erred in limiting the Act by utilizing the Board's new concept that the "ultimate authority" of the university's Board of Trustees negates the Faculty's authority.

Initially, what has come to be known as the Board's "ultimate authority" concept is in direct conflict with the statutory definition of supervisor. Thus, the statute not only expressly excludes those with actual authority in regard to any one or more of several designated actions (as, for example, effecting promotions), it also excludes those who have the authority "effectively to recommend such action". (50) Obviously, everyone whose authority is recommendatory is subject to the higher authority of the individual who must consider their recommendations, no less the "ultimate authority" of the entity's Board of Directors.

In the few previous contested decisions where the Board denied the Act's exclusion to individuals because their supervisory authority was subject to the authority of others, the Courts have been quick to invalidate such limitations of the Act's clear requirements. Thus, this Court has said:

(50) Section 2(11), 29 U.S.C. 152(11). The section of the Act also requires the use of independent judgment, which the Board does not contest that the faculty utilize.

"This power to review held by the immediate supervisors of the engineers whose status is at issue does not demonstrate that the latter are not 'supervisors' under the Section 2(11) definition. The power to recommend promotion is, of course, not the power actually to promote and consequently promotion recommendations will always be subject to review by those others who, in fact, have the final power to promote." (51)

Nor, is this most obvious conclusion limited to this Circuit. The Sixth Circuit resolved a related contention whereby the Board denied supervisory status on the basis that the authority of the individual involved was "delegated" to him from someone else and was, therefore, subject to the other individual's control or revocation, in the following manner:

"In arriving at its conclusion, the Board reviewed the various higher levels of supervisory authority in Eastern's table or organization and emphasized that dispatchers' authority flows from and is carried out in obedience to instructions given by such higher authority. In the beginning consideration of the issue involved, the Board's field examiner took occasion to say that "It was the union's position that any authority exercised by the dispatcher is delegated....". We are persuaded that giving importance to this observation led the Board into a continuing misapprehension of the question it was to decide. The exercise of supervisory authority is nonetheless effective because it is a delegated authority." (52)

(51) N.L.R.B. v. Metropolitan Life Ins. Co., 405 F.2d 1169, 1177 (2nd Cir. 1968).

(52) Eastern Greyhound Lines v. NLRB, 337 F.2d 84, 86 (6th Cir. 1964). See also NLRB v. Gary Aircraft Corp., 368 F.2d 223 (5th Cir. 1966); NLRB v. Southern Airways Co., 290 F.2d 519 (5th Cir. 1961).

Not surprisingly, no case has been found in which the Board applied its "ultimate authority" limitation of the "supervisory" or "managerial" exclusions of the Act to individuals in any industry apart from its recent spate of cases involving faculty in institutions of higher education. In fact, the Board has itself excluded numerous individuals whose supervisory or managerial authority was subject to that of higher authority. For example, in General Dynamics Corporation, Convair Aerospace Division,⁽⁵³⁾ the Board itself excluded individuals as managerial employees although it found:

"Final Decision...is determined by higher authority."⁽⁵⁴⁾

Indeed, if the novel "ultimate authority" concept was now to be given free rein, it would practically eliminate the entire managerial and supervisory exclusion of the Act since no one - neither a Dean at a University, nor the President of General Motors - is not subject to the "ultimate authority" of their respective Board of Trustees or Board of Directors.

As the U.S. Supreme Court recently noted in Textron, supra; the Board is not free to even narrow long-standing exclusions from the Act, no less to eliminate them.⁽⁵⁵⁾

(53) 213 NLRB 851, 87 LRRM 1705. This case is relied on by the Board in various regards and is cited at pp. 17, 20, 23, 25 and 27 of the Board's brief.

(54) Ibid at 860, 87 LRRM at 1718.

(55) Textron, supra at 289.

Moreover, where as here, the Board's "ultimate authority" doctrine is in contravention of even the Board's own decisions, it would seem necessary, under the standards in Textron, supra, that it be considered a departure from "long-standing interpretations" in contravention of implicit Congressional intention and expectation. (56)

- (D.) The Board erred in modifying the Act by utilizing the Board's new doctrine that the Act's exclusions apply only to individual authority and not to collective authority.
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The Board's second novel limitation of the "supervisory" and "managerial" exclusions provided for by the Act is equally confounding. Thus, the Board has now put forth a novel doctrine, again apparently only with regard to faculty at institutions of higher education, that supervisory and managerial authority does not lead to "supervisory" or "managerial" status when such authority is exercised on a "collective" rather than "individual" basis.

The Courts have not deemed the issue of whether managerial authority is exercised on a collective or individual basis sufficiently important to isolate it. Thus, in Textron, the Court noted, without concern that the individual buyers involved in that case had authority in

(56) Ibid.

large measure only as part of a "team" of individuals from various departments. (57)

This same assumption seems implicit in the First Circuit's decision in Wentworth Institute where the court rejected a managerial or supervisory exclusion for that small technical institute's faculty because at Wentworth there was "no evidence of an instance of significant faculty impact collectively or individually." (emphasis added) (58) In so indicating, the Court seems to have intentionally disregarded the Board's suggestion that for faculty, individual" and not "collective" authority is of consequence.

Finally, it might be noted that the Act has always contemplated managerial or supervisory status for individuals whose authority even more clearly exists only on a collective basis. This is true not only of members of a management "team" (59) but is also characteristic of members of Boards of Directors whose authority is generally proscribed as existing only as part of, and in the framework of, the collective group.

(57) Textron, supra, at 270.

(58) NLRB v. Wentworth Institute of Technology, 515 F.2d 550, 557 (1975).

(59) Textron, supra, at 270.

(E.) The Board erred by limiting the Act by utilizing the Board's new concept that authority which is in the interest of the faculty is thereby not in the interest of the employer.

The Board has more recently added yet a third novel limitation of the Act's managerial and supervisory exclusions; namely, that the exclusion should not apply because faculty authority "...is exercised in the faculty's own interest rather than 'in the interest of the employer'".

As discussed, neither in Y.U. nor in any of the few other cases where the Board added this additional reason for denying managerial and supervisory exclusions is there the slightest discussion, justification or rationale for the Board's conclusory statement. Indeed, there is no indication in such cases that any of the parties ever raised such issue or offered any evidence directed to showing that the faculty's authority was not exercised in the interest of the employer. Rather, what the Board has apparently done has been to choose to conclude that inasmuch as faculty authority in regard to faculty conditions of employment is, by its nature, in the faculty's own interest, it is, therefore, assumedly not in the interest of the employer.

What the Board refused to accept is that simply because the faculty itself has an interest in its own conditions of employment, so too does the employer-institution. This proposition was quickly apparent

to the Circuit Courts in the few previous instances where the Board sought to utilize this concept in a comparable vein. Thus, when the Board denied supervisory status to owner-operators who leased their trucks to their employer on the similar ground that the owner-operators power to terminate employment "...does not constitute a power to discharge in the interest of the employer", the Circuit readily voided the Board's novel interpretation:

"...we consider the distinction mediievally theological. Both the Company and the tractor owner-operators have the same interest, backed by their separate investments to be sure, in maximizing production. We are unable to distinguish Deaton Truck Lines, 143 NLRB 1372, 53 LRRM 1497 (1963), enf'd, 337 F.2d 697, 57 LRRM 2209 (5th Cir. 1964), in which the interests of both the company and the truck owners were so intertwined that the power were exercised for both." (emphasis added) (60)

The Board's disregard of faculty authority on the assumption that such authority is exercised in the interest of the faculty alone rather than the interest of the employer as well is based entirely on reasoning that penalizes faculty for having far more power and authority than their industrial counterparts. Thus, if, as at an industrial enterprise, the President of the University determined what products were to be made, then individuals such as managers or foremen with authority to decide whom to hire, promote, etc. to make those products, would clearly be in the status of managerial or supervisory personnel. However, because

(60) NLRB v. Scott Paper Co., 440 F.2d 625, 630 (1st Cir. 1971).

at a mature university, faculty decide not merely whom to hire, promote, etc. but also what the (educational) product should be, the Board would deny them managerial or supervisory status for supposedly acting in their own interest rather than in the interest of the Employer.

Finally, it should be noted that the Board's denial, particularly of the "managerial" exclusion, because faculty supposedly exercise authority in their "own interest rather than in the interest of the employer" is simply contrary to the holding of the Supreme Court in Textron, supra. There, the Court held that all managerial employees are excluded from the Act's definition of covered employees and refused to accept Board limitations of the managerial exclusion based on the Board-determined "interest of the employee" in asserting such managerial authority:

"[The Circuit Court's decision] explained that this "exclusion embraced not only an employee 'so closely related to or aligned with management as to place the employee in a position of conflict of interest between his employer on the one hand and his fellow workers on the other' but also one who is 'formulating, determining and effectuating his employer's policies on his discretion, independent of an employer's established policy, in the performance of his duties'." (citations omitted) (61)

In short, the Board is now reading into the Act another unjustified modification of the managerial exclusion in particular.

(61) Textron, supra, at page 273.

POINT II

THE BOARD ERRED IN RULING THAT FACULTY WHO ARE MEMBERS OF GOVERNANCE COMMITTEES ARE NOT MANAGERIAL OR SUPERVISORY EMPLOYEES WITHIN THE MEANING OF THE ACT.

- (A.) The Board erred in limiting the Act by utilizing the Board's new concept that faculty members on governance committees "serve as representatives of the faculty rather than management".

The Board has recognized that certain committees generally composed entirely of, or controlled by, a limited number of faculty members possess very substantial authority with respect to determining conditions of faculty employment as well as a vast range of related governance matters. (62)

A typical governance committee examined by the Board in a prior proceeding was found to have authority as follows:

"It is clear from the record that the personnel committee has considerable and effective authority with respect to a wide range of actions affecting the status of the University's professional personnel." (63)

Typically also, the breadth of authority of governance committees encompasses a wide gamut of employment issues, any one of which would be more than sufficient subject matter to confer "supervisory" or "managerial" status. (64)

Thus, the Board noted one such committee's range of authority as follows:

(62) Examples include Faculty Review, Personnel and Grievance Committees, such as those at Y.U., Adelphi, and other institutions.

(63) Adelphi, supra, at 648.

(64) Ohio Power Co., supra, at 387.

"The function of the [personnel] committee is to pass on all matters of tenure, hiring at or promotions to associate or full professor, granting sabbatical or honorary leaves-of-absence, and suspending or terminating full-time faculty members during the term of their contracts." (65)

Another common form of governance committee is a faculty grievance committee, which in a prior proceeding was noted by the Board to have the following scope:

"It is the function of this committee to hear and recommend the adjustment of all faculty grievances, excepting dismissal proceedings." (66)

While the Board made reference to the theoretical role of the committee as "recommending" the adjustment of grievances, the Board noted that every one of the committee's recommendations had been accepted and added as a footnote the fact that "The parties stipulated that the committee has authority to adjust grievances". (67)

Indeed, when it was suggested in a subsequent case that the Board had found such personnel and grievance committees to have only an "advisory" role, the Board made clear that its finding was that such committees had effective decision-making authority. Thus, as to the suggestion that such committees were "...limited to providing advice to a Board of Trustees": (68)

(65) Adelphi, supra, at 647.

(66) Ibid.

(67) Ibid., n.29.

(68) Ibid.

"The last overstates the case to the extent it implies that the Adelphi faculty lacked effective authority. The Board found to the contrary: the action of the personnel committee there appears to have been definitive as a practical matter", (emphasis added). (69)

In short, the Board has determined such faculty committees to have substantial "definitive" and "actual" authority of a clearly supervisory and managerial nature. Again, however, the Board adopts unjustified limitations on the exclusions provided for in the Act to negate the proper legal conclusions flowing from its own factual findings. Here, the first such limitation is provided by the Board's concept that the members of such faculty committees "...serve as representatives of the faculty rather than of management". (70)

By applying this concept to governance committee members, however, the Board is contradicting the very concepts it utilized to deny the managerial or supervisory exclusion to faculty generally. Thus, if the Board takes the position that members of governance committees "serve as the representatives of the faculty rather than management", the Board is thereby recognizing that the "ultimate authority" of such governance committees is the faculty. However, this rationale clashes with the Board's insistence that the reason it could not recognize faculty as having "managerial" or "supervisory" status was that the faculty were subject to the "ultimate authority" of management in the form of the Board of Trustees. (71)

(69) Ibid.

(70) Y.U., supra, at 1054.

(71) Ibid. See POINT I (A.) of this brief for a detailed discussion of the Board's "ultimate authority" doctrine.

We submit the Board cannot have it both ways.

One must conclude that the Board has determined, the Act and the case law to the contrary, that it simply does not wish to designate any faculty as having "managerial" or "supervisory" status. (72)

(B.) The Board erred in limiting the Act by disregarding "collective authority" in relation to faculty members of governance committees.

The Board's concept that "collective" rather than "individual authority" amounts to "no authority" within the meaning of the Act has already been discussed at length in POINT I (D.) (in regard to faculty generally at certain institutions with the established concept of faculty governance).

Suffice it to note that the same error which motivated the Board to use that concept in regard to faculty generally applies with even greater force to the Board's use of that concept to disavow the clear and recognized "supervisory" and "managerial" status of members of faculty governance committees.

(72) While the number of individuals in this category at Yeshiva University was less than the difference in votes in the representation election, it should be noted that this Circuit, enforcement is to be denied wherever the "laboratory conditions" for an election are not present as where any number of supervisory or managerial personnel have been allowed to vote (and without regard to whether the number of such personnel would necessarily alter the actual vote); see NLRB v. Metropolitan Life Insurance Company, 405 F.2d 1169 (2nd Cir., 1968).

POINT III

THE BOARD ERRED IN RULING THAT DEPARTMENT CHAIRMEN ARE NOT SUPERVISORY OR MANAGERIAL EMPLOYEES WITH- IN THE MEANING OF THE ACT ON THE BASIS OF THE BOARD'S CONCEPT THAT THE CHAIR- MEN'S AUTHORITY IS EXERCISED "PRIMARYLY AS INSTRUMENTS OF THE FACULTY...FROM WHOM THEY RECEIVE THEIR AUTHORITY".

In its decision at Y.U., the Board concluded:

"[I]t appears that, although they [de- partment chairmen] have certain formal responsibilities with respect to decisions on such matters as appointment, promotion, and tenure, the department chairmen and their concomitants act primarily as instru- ments of the faculty in these matters. The department chairmen, in these respects, therefore stand largely on the same footing as the faculty from whom they receive their authority." (73)

Thus, the Board has adopted a strikingly anomalous position. Initially, the Board has concluded that faculty generally lack managerial or supervisory status because their authority exists only as a group and, moreover, it is not the "ultimate authority". However, when certain aspects of authority are demonstrated to be within the hands of a single individual, i.e., the department chairman, the Board then holds that such authority does not confer managerial or super- visory status because the chairman's authority is exercised "primarily as instruments of the faculty...from whom they receive their authority." (74)

(73) Y.U., supra, at 1055-1056.

(74) Ibid.

Again, we see what appears to be a determined Board policy to administratively limit the scope of Section 2(11) of the Act. Thus, the Board has reasoned that the chairmen lack managerial or supervisory status because they are subservient to the faculty. Yet the Board has also reasoned that faculty lack managerial or supervisory status because they are subservient to the Board of Trustees.⁽⁷⁵⁾ These logical inconsistencies become apparent in the Board's rationale because of the Board's stubborn refusal to recognize the managerial and supervisory status of any faculty at a mature university.

In addition to these factual inconsistencies, the Court is respectfully referred to the discussions in POINT I (C.) herein regarding the impropriety of disregarding supervisory or managerial authority because it is originally delegated from others.

(75) We would imagine the Board would determine members of the Board of Trustees also lack managerial or supervisory status because they can only exercise their authority on a "collective" rather than on an individual basis.

POINT IV

THE BOARD ERRED IN DENYING SUPERVISORY STATUS TO VARIOUS INDIVIDUALS WHO SUPERVISED NON-UNIT EMPLOYEES BUT WHO SPENT LESS THAN FIFTY PERCENT OF THEIR TIME EXERCISING SUCH AUTHORITY, ON THE BASIS OF THE BOARD'S UNSTATED, BUT OBVIOUS APPLICATION OF ITS FIFTY PERCENT RULE.

The Board's so-called "50% rule" is another administrative variation on the supervisory exclusion of the Act. By and large, faculty are the only individuals with on-going supervisory responsibilities against whom the rule has been applied.⁽⁷⁶⁾ Under the 50% rule, where an individual exercise supervisory authority in regard to non-unit faculty or non-unit employees, such individual's supervisory authority will not be recognized as sufficient for exclusion unless the supervisor actually spends more than 50% of his time exercising such supervisory authority.

The so-called 50% rule has been specifically articulated as the basis for denying supervisory status in various Board decisions involving faculty.⁽⁷⁷⁾ This has been the case in the very factual situation involved at Y.U., where,

(76) As Kahn noted on this issue "...the Board has directly contradicted itself in non-faculty University cases...", citing Claremont College, 198 N.L.R.B. 121 (1972) and University of Chicago Library, 13-CA-11447, modified 265 N.L.R.B. 44 (1972). Kahn also points out that "...in industry, [the Board] has uniformly excluded individuals supervising non-unit employees throughout the year regardless of the time spent in so doing." Kahn, op. cit. at 130-31.

(77) Fordham University, supra, at 974; Adelphi, supra, at 644; N.Y.U., 205 N.L.R.B. at 8-9; N.Y.U., 221 N.L.R.B. at 1150.

for example, department chairmen exercised supervisory authority over non-unit part-time faculty.⁽⁷⁸⁾ In the Y.U. proceeding, the Board chose to utilize the 50% rule without making specific reference to it. Thus, it did not contest the fact that certain individuals, such as department chairmen at Y.U., possess supervisory authority over non-unit employees, such as part-time faculty.⁽⁷⁹⁾ Indeed, it probably could not since its declination to exclude chairmen in relation to their supervisory authority over full-time faculty was based in large measure on the Board's position that the chairman's authority derived from the full-time faculty of his department where he stands "first among equals".⁽⁸⁰⁾ Obviously, this same challenge could not be made with regard to the chairman's authority over part-time faculty without, in the process, constituting a Board admission that part-time faculty share the same community of interest as full-time faculty and are among the group of "equals" from whom the chairman's authority is supposedly derived. The only difference, then, between Y.U. and the other Board decisions dealing with the same requested

(78) N.Y.U. 205 N.L.R.B. at 8-9.

(79) The issue of the 50% rule was also raised at Y.U. brief of the Board at p. 93, in regard to various directors who were also nevertheless included by the Board without explanation, Y.U., supra, at 1057.

(80) See, for example, Y.U., supra, at 1055-56.

exclusion was that in Y.U. the Board omitted specific reference to its 50% rule. (81)

A brief review of the Board's foundation for its 50% rule amply demonstrates that the rule is violative of the Act and is contrary of the Board's own long established case law.

As to the Act's requirements, the law in this respect is well-settled with regard to the supervisory exclusion:

"The statute turns upon the existence of a power and not upon the frequency of its utilization". (82)

As to the Board's case law, no Board decision prior to the adoption of the 50% rule denied supervisory status to any individual who exercised supervisory authority on a year-round basis, regardless of the percentage of time actually spent exercising such supervisory authority.

The Board claims, however, that the case law basis for the 50% rule is its decision in Westinghouse. (82a) In fact,

(81) Supra, at 1056 n.19. Interestingly, elsewhere in its Y.U. decision, the Board let slip its continuing adherence to its 50% rule, and noted that "'absolutely more than half of the time' has been spent by a principle investigator in the supervision of non-profit employees." Ibid at 1056 n.19.

(82) Arizona Public Service Company v. N.L.R.B., 453 F.2d 228-230 (9th Cir. 1971); Ohio Power Co., supra at 388; NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2d Cir. 1968); NLRB v. Leland-Gifford Co., 200 F.2d 620 (1st Cir. 1952); and N.L.R.B. v. Fullerton, 283 F.2d 545 (9th Cir. 1960). Note that this Court questioned the legal validity of the 50% rule in its recent Mercy College decision, but did not rule on the issue since it remanded the Board's decision on other grounds, 536 F.2d at 550 (1976).

(82a) 163 N.L.R.B. 723 (1967), enforced, 424 F.2d 1151 (7th Cir. 1970).

however, Westinghouse lends no support at all since it involved casual supervisors who did not regularly have supervisory authority on a year-round basis. (83)

There is little dispute that the supervisory authority of chairmen in regard to part-time faculty is an integral part of their regular year-round duties and is not of a temporary nature. As such, the Board's own case law require exclusion without regard to the percentage of time spent exercising supervisory authority.

Only one additional reason for the incorrectness of the Board's 50% rule need be added. As noted in Adelphi, supra, the Board's rationale for the 50% rule was that in the absence of at least 50% of time spent supervising non-unit employees:

"No danger of conflict of interest within the unit is presented..." (84)

Yet, it was this very rationale that the Supreme Court, after carefully reviewing the legislative history of the Act, invalidated in its historic Textron decision. As the Court there said:

"...all managerial employees' rather than just those in positions susceptible to conflict of interest in labor relations are excluded from the protections of the Act." (85)

(83) 424 F.2d at 1158. The precise same conclusion is reached by Kahn who notes: "Not only does the Westinghouse case not support the Board's position but it lends support to excluding faculty as supervisors", op.cit. at 133.

(84) Adelphi, supra, at 19.

(85) Supra, at 1761-62.

One might add parenthetically that while the Board's "conflict of interest" rationale is invalid in light of Textron, its factual conclusion that no conflict exists where supervision is over non-bargaining unit employees is doubtful. Thus, a chairman's supervisory authority over part-time faculty obviously raises potential conflicts with his inclusion in the full-time faculty's bargaining unit. For example, a department is often allocated a set amount of money for total full-time and part-time faculty salaries. Obviously the number of part-time faculty hired by the chairman and the salary he decides to pay each will clearly have bearing on the amount of salary dollars available for the full-time faculty unit of which he is to be a part, if the Board's determinations in this regard are allowed to stand.

POINT V

THE BOARD ERRED IN ITS TREATMENT
OF PART-TIME FACULTY BY APPLYING
A RULE ADOPTED ON THE BASIS OF A
PROCEDURE OTHER THAN THAT REQUIRED
BY STATUTE.

The Board's treatment of part-time faculty at Yeshiva University involved the admitted application of a pre-determined "policy" of excluding part-time faculty from all faculty bargaining units. We suggest that whether the Board actions are properly labeled a "policy" or whether they, in fact, constitute a "rule," the Board violated the intent and the specific language of the Administrative Procedure Act. (86)

It is submitted that the failure to adhere to the rule-making requirements of the APA has worked to the prejudice of Y.U., certain of the amici and other similarly situated universities.

The "policy" applied to part-time faculty at Y.U. was stated in the Board's brief to this Court

"The Board's present policy is to exclude all part-time faculty 'who are not employed in 'tenure track' positions.'" (87)

The exclusion from the bargaining unit of all tenure-ineligible part-time faculty (88) has been the Board's "present" policy since 1973 when the Board engaged in a questionable

(86) 5 U.S. C. §§ 551, et seq. (hereinafter "APA").

(87) Brief p. 43.

(88) Apart from a handful of mostly experimental experience, tenure eligibility is as rare among part-time faculty as it is for numerous other groups regularly included in faculty units, such as librarians. Moreover, at many institutions, tenure is severely limited or forgoen even for full-time faculty.

proceeding designed to broadly reconsider what had previously been a uniform Board "policy," in both industry and in every faculty representation case that had previously reached the Board, of including in the unit all regular part-time faculty.⁽⁸⁹⁾

In 1973, however, the Board decided a new "policy" on part-time faculty had to be considered because, as the Board admitted, its previous decisions had manifested an

"... inability to formulate what we regard as a satisfactory standard for determining the eligibility of adjuncts in Board elections."⁽⁹⁰⁾

Instead of seeking to better comprehend and properly deal with the admittedly complex situation of university communities in this and other regards, the Board instead decided the easier path was simply to exclude all part-time faculty, thereby eliminating the need for a definition of regular part-time faculty to be included and non-regular part-timers to be excluded.

The Board's method of removing the complexity was as unfortunate as its motivation. The governing statute clearly

⁽⁸⁹⁾ See, for example, C.W. Post, supra at 905-906, Univ. of New Haven, 190 NLRB 478 (1971).

⁽⁹⁰⁾ NYU, 205 N.L.R.B. at 6, fn. 9; see also Board Br., 43, fn. 19.

provides that a notice in the Federal Register to potentially affected institutions is required where an agency intends to consider the adoption of a "... statement of general or particular applicability and future effect ..." (91) Instead, the Board limited the opportunity to be heard on the "policy rule" under consideration to three institutions. Two were apparently selected by the Board because they then had cases pending. (92) The third, however, Catholic University, was merely one of several institutions that had already received a Board decision that had included regular part-time faculty in the unit. (93) As the Board subsequently explained in its revised decision in Catholic University:

"Thereafter, [after issuing the decision to include part-time faculty in the unit in this case] upon further consideration of the matter, the Board decided, sua sponte, to reconsider the appropriateness of including part-time faculty members, as a class, in bargaining units which are otherwise composed exclusively of full-time faculty members." (94)

While the Board lacks a statutory basis for any forced selection of spokesmen in a rule-making situation, it might be noted that the institutions selected by the Board were in large measure particularly unrepresentative of higher education as a whole. One of the three cases selected by the Board, Catholic University, was entirely limited to a law

(91) 5 U.S.C. § 551(4) defining "rules" subject to the APA's requirements.

(92) N.Y.U. and Fairleigh Dickinson.

(93) The Board also heard oral argument from two national faculty unions, the A.A.U.P. and the A.F.T.

(94) Catholic University (Supplemental Decision) supra at 130.

school. Another, N.Y.U., was similarly concerned with evidence derived in large measure in regard to a law school, and the university had advised the Board in advance of its largely unique situation in regard to its part-time faculty. (95) Of particular importance, Yeshiva University, and many other affected institutions were never afforded their statutory right to be heard on the issue prior to the Board's adoption of the rule to be applied in their cases. Had they been given this right, the Board might well have been offered an adequate analysis to formulate a sound definition of "regular (96) part-time faculty". As Kahn suggests, many Board errors would not have occurred if the Board had given a broad spectrum of institutions a right to be heard before the (97) Board adopted its policy to be applied to them.

If the Board's inventive attempt at an alternative to the statutory requirements are not sanctioned by this Court, the Board would have to rely on its theory, that so long as a "rule" is announced in the context of an adjudicatory proceeding, it escapes the requirements of the Administrative (98) Procedure Act.

(95) See N.Y.U., 2-RC-15719, 2-RC-15719 and 2-RC-15757.

(96) Y.U. had offered in the representation proceeding a definition of regular part-time faculty for inclusion that arguably met all the interests of the statute and the Board; see Y.U. Brief to NLRB p. 114.

(97) Kahn, op. cit.

(98) NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

The legal validity of that position could hardly be weaker.

As the Supreme Court stated in Wyman-Gordon:

"The Board asks us to hold that it has discretion to promulgate new rules in adjudicatory proceedings, without complying with the requirements of the Administrative Procedure Act.

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention". (99)

The Board's invested alternative to the statutory scheme is not only statutorily invalid but also totally failed to afford Y.U., and other affected educational institutions, "the substance of the requirements of the Administrative Procedure Act". (100) Indeed, the legal inadequacies cited in the Myman-Gordon case can be repeated without variation in regard to the Board's invented alternative to the statutory requirements of rule-making applied to Yeshiva University:

"Apart from the fact that the device fashioned by the Board does not comply with statutory command, it obviously falls short of the substance of the requirements of the Administrative Procedure Act. The 'rule' created in Excelsior was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the 'hearing', whereas notice in the Federal Register would have been general in character

(99) 394 U.S. 759, 764 (1969) citations omitted).

(100) Ibid.

under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing and all interested parties would have an opportunity to participate in the rule-making." (101)

Finally, the Board suggests Textron as indicative of a judicial permissiveness to tolerate agency formulation of "policies" or "rules" without adherence to the statutory requirement that potentially affected litigants have an opportunity to be heard in advance. Aside from the fact that Textron involved a totally dissimilar proceeding to that applied at Y.U., supra, the Board's reference is mistaken. Thus, the Supreme Court noted in Textron that by remanding to the Board for reconsideration:

"Those most immediately affected, the buyers and the company in the particular case, are accorded a full opportunity to be heard before the Board makes its determination". (102)

This important right as well was not even arguably afforded to Y.U. or to the several educational institutions already affected to their detriment by the Board's adoption of its "policy" or "rule"

Undoubtedly, use of the statutory format for the development of rules would have avoided the tortured rules the Board is presently attempting to apply to the faculty of mature universities.

(101) Ibid.

(102) Textron, supra at 295.

CONCLUSION

For each of the reasons set forth herein, the decision of the Board was improper, and, therefore, the Order of the Board should be denied enforcement.

Dated: New York, N.Y.
April 17, 1978.

Respectfully submitted,

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For the Second Circuit

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National Labor Relations Board
Petitioner

v/
Yeshiva University
Respondent

and
Yeshiva University Faculty Association
Intervenor

State of New York, County of New York, ss.:

Raymond J. Braddick,
agent for Winer Neuberger & Sive, being duly sworn deposes and says that he is
the attorney
for the above named Amicus Curiae herein. That he is over
21 years of age, is not a party to the action and resides at 11 Park Place New York, New York

That on the 17th day of April, 1978, he served the within
Brief of New York University (Amicus Curiae)

- upon the attorneys for the parties and at the addresses as specified below
1. Howard E. Perlstein c/o National Labor Relations Board
Washington D.C.
 2. Saul G. Kramer Esq. c/o Proskauer Rose & Goetz Esqs.
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by depositing 3 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 17th.

day of April, 1978

ROBERT W. JOHNSON,
Notary Public, State of New York
No. 4509705

Qualified in Delaware County
Commission Expires March 30, 1979

